Supreme Court, U.S.
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No. 99-656

IN THE

# Supreme Court of the United States

NEW YORK DEPARTMENT STORES
DE PUERTO RICO, INC.,

*Petitioner,*

*v.*

ALMACENES RODRIGUEZ, INC.
and E. RODRIGUEZ & SONS, INC.,

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO**

## RESPONDENTS' BRIEF IN OPPOSITION

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## COUNTERSTATEMENT OF QUESTIONS PRESENTED

A. Since the decision appealed from is interlocutory, does this Honorable Court lack jurisdiction to enable it to entertain the Petition?

B. Does the manner in which the Supreme Court of Puerto Rico applies and interprets a rule of its creation (Rule 10(A) of the Regulations of the Circuit Court of Appeals of the Commonwealth of Puerto Rico) to permit a lower appellate court to state the essential facts, and adopt by reference the findings of the lower court, comport with the requirements of due process under the United States Constitution?

## COUNTERSTATEMENT AND STATEMENT PURSUANT TO RULE 29.6

Petitioner, New York Department Stores de Puerto Rico, Inc. ("NYDS") is owned 100% by Marshalls of MA, Inc., (herein "Marshalls") which in turn is a wholly-owned subsidiary of TJX Companies, Inc., which is traded on the New York Stock Exchange (Symbol = TJX).

Neither Respondent has a parent company and no publicly held company owns 10% or more of the stock of either Respondent.

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## OPINIONS BELOW

1. Decision of the Court of First Instance, San Juan Superior Division, rendered on December 23, 1996 in Civil Action KPE94-0345 (803) (Petition, App. C, pp. 9a-54a.)

2. Decision of the Circuit Court of Appeals, San Juan Regional Circuit, rendered on September 23, 1998 (Petition, App. B, pp. 2a-8a).

3. Motion of Petitioner Requesting Reconsideration before the Circuit Court, dated October 23, 1998.

4. Resolution of the Appellate Court denying the requested reconsideration, dated February 9, 1999 (See Appendix A, *infra.*).

5. Writ of certiorari to the Supreme Court of Puerto Rico, filed by Petitioner on March 24, 1999.

6. Resolution of the Supreme Court of Puerto Rico dated May 14, 1999, entered and notified on May 17, 1999, denying Petitioner's requested Writ of Certiorari, with a simple statement: "no ha lugar" whose correct interpretation is the equivalent of "denied".

7. Motion Seeking Reconsideration, filed by Petitioner before the Supreme Court of Puerto Rico on June 1, 1999.

8. Resolution of the Supreme Court of Puerto Rico dated June 18, 1999, entered and notified on June 22, 1999, denying Petitioner's Motion Requesting Reconsideration of June 1, 1999, with a simple statement: "no ha lugar" whose correct interpretation is the equivalent of "denied".

9. Second Motion Seeking Reconsideration, filed by Petitioner before the Supreme Court of Puerto Rico on June 25, 1999.

10. Second Resolution of the Supreme Court of Puerto Rico dated July 16, 1999, entered and notified on July 21, 1999, denying Petitioner's Second Motion requesting Reconsideration, with a simple statement: "no ha lugar" whose correct interpretation is the equivalent of "denied," and with the phrased "aténgase," which is interpreted as "abide by it." The phrase "aténgase," further means that the Supreme Court of Puerto Rico has accepted its last motion for reconsideration on the matter, and will not accept any further motions for reconsideration.

11. Motion of Petitioner to Retain the Mandate in the Supreme Court of Puerto Rico, dated July 28, 1999, and advising the Supreme Court of Puerto Rico of its intention to file a Petition for a Writ of Certiorari on Federal Due Process grounds.

12. Reiteration by Petitioner of its motion to hold the Mandate, dated October 4, 1999, indicating the Petition would be filed in the Supreme Court of the United States by October 14, 1999.

13. Resolution of the Supreme Court of Puerto Rico dated October 8, 1999, entered and notified October 13, 1999, denying Petitioner's request that it retain the Mandate pending Petitioner's filing of a Petition for Writ of Certiorari.

14. Second Motion requesting retention of the Mandate, dated October 20, 1999, indicating that the Petition had been filed and once again requesting retention of the Mandate.

15. Third motion requesting retention of the Mandate, informing that the case has been docketed, and forwarding copy of the letter of the Clerk of the Court of the Supreme Court of the United States to that effect.

16. Resolution by the Supreme Court of Puerto Rico, dated October 29, 1999, entered and notified November 1, 1999, once again declaring "no ha lugar" Petitioner's request to retain the Mandate.

## STATEMENT OF JURISDICTION

As hereinafter argued in detail, this Honorable Court lacks jurisdiction over this Petition because appeals can only be had against final judgments of the Supreme Court of Puerto Rico (28 U.S.C. § 1258). A similar rule applies to the States as well (28 U.S.C. § 1257). Interpreting the latter statutory provision, this Court has recently ratified this "final judgment rule" requirement in a case involving Section 1257, *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75, 118 S. Ct. 481, 139 L. Ed. 2d 433 (1997). As shall be shown, determination of liability does not finally adjudicate the claim, and until that occurs, under Puerto Rico law, the judgment is interlocutory, not final.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutory provision involved in this case is 28 U.S.C. § 1258, which reads as follows:

> Final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United

States is drawn in question or where the validity of a statute of the Commonwealth of Puerto Rico is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

## COUNTERSTATEMENT OF THE CASE

On May 19, 1993, Petitioner New York Department Stores, Inc. (herein "NYDS") entered into a license agreement with Respondents[1], to operate shoe departments in ten stores operated by NYDS in Puerto Rico (the "Agreement"). The Agreement was for a duration of five years, renewable by Respondents for two additional five-year periods. One year into the Agreement, Investcorp, an entity that represented the stockholders of NYDS, and which was engaged in the business of buying financially troubled concerns to make them solvent, and then sell them at a profit, saw an opportunity to sell NYDS's stock to Marshalls of MA, Inc., a wholly-owned subsidiary of TJX Companies, Inc. (herein "Marshalls"). Because the existence of such a possible transaction had been contemplated by the Respondents, they sought and obtained a clause (Clause 22) in the Agreement which imposed on NYDS the obligation of making the Agreement binding on anyone purchasing the

1. In fact, the agreement was signed with Almacenes Rodríguez, Inc., which was owned by Emilio Rodríguez Nigaglioni, who also was the sole owner of E. Rodríguez & Sons, Inc. The lower court found as a matter of fact that the parties treated these corporations interchangeably.

business. Petitioner and Respondents came to agree upon all of the essential terms and conditions of the contract. NYDS forwarded Respondents a contract initialed and signed by its President, and authorized Respondents to commence performance, which Respondents did. After performance had commenced and before the agreement was returned signed by Respondents, NYDS tried to get Respondents to amend the contract by signing an addendum terminating the agreement if NYDS were sold. Respondents refused. In the negotiations with Marshalls, NYDS represented the Agreement was in full force and effect, and neither of the parties had breached it. Marshalls insisted in running its own shoe departments, and insisted that Respondents be removed from the stores. NYDS offered a compensation for the premature cancellation of the Agreement, which Respondents refused. To carry out this removal, NYDS had clearance sales, and closed its stores. Respondents were allowed to participate in the clearance sales. When such sales concluded, NYDS closed its stores and Respondents were obliged to abandon their shoe departments. When the NYDS stores subsequently reopened, the shoe departments were run by Marshalls and Respondents were denied the right to participate in the operation. Respondents sued NYDS for breach of contract and damages. Petitioner denied that a contract existed contending that its Board of Directors did not approve it, that Respondents had agreed to sign the Addendum, and that in any event Respondents were precluded from seeking specific enforcement of the agreement since Respondents breached the contract by assigning the agreement.. The Court of First Instance, San Juan Superior Court, (herein the "lower court") having bifurcated the trial into a liability phase and a damages phase, issued a partial judgment on December 23, 1997 (Petition App. C, pp. 9a-55a, herein the "Partial Judgment") and found

as a matter of Puerto Rico law a contract had been perfected between NYDS and Respondents which protected Respondents in the event of a sale by NYDS. The damages phase of the case was set for the month of May, 1997.

As listed above, Petitioner filed several proceedings to seek to overturn the Partial Judgment, commencing with a request for review at the next appellate level, the Circuit Court of Appeals, San Juan Regional Circuit (herein the "Appellate Court"). The Appellate Court issued a Judgment on September 23, 1998 (Petition, App. B, pp. 2a-8a, herein the "Appellate Court Judgment") stating the facts, affirming the lower court in all respects, and adopting by reference the findings of the lower court.

Petitioner believed that the Appellate Court Judgment did not comply with the regulations promulgated by the Puerto Rico Supreme Court for the governance of proceedings of the Appellate Court, specifically Rule 10(A)[2] thereof, and sought reconsideration on that basis as well as on the merits. The gist of Petitioner's argument (apart from

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2. Rule 10(A) reads as follows:

> Rule 10. Decision on the merits
>
> (A) The corresponding panel of the Circuit Court of Appeals shall resolve the writs submitted for its consideration through a resolution or judgment, which shall include a statement of facts and an exposition and analysis of the issues raised.

Rule 10(A) of the Regulations for the Puerto Rico Circuit Court of Appeals, promulgated by the Supreme Court of Puerto Rico, effective May 1, 1996, T4. L.P.R.A. Ap. XXII-A R.10.

its attempt to relitigate the facts found below) is that the Appellate Court is obliged, by Rule 10(A) to issue complete findings of fact and conclusions of law of its own, not relying upon those of the lower court, no matter how proper and accurate they may be. The Appellate Court denied the request for reconsideration, saying that:

> . . . Contrary to the allegations of the petitioner, in our Judgment of September 23, 1998, we clearly stated that, having examined the alleged errors and having analyzed the bases for the decision of the Court of First Instance "*this Court accepts and adopts as its own said conclusions of law.*" (See Judgment of September 23, 1998, Part II, First paragraph, emphasis supplied). The findings regarding the relationship between the corporation named Almacenes Rodríguez Inc. and E. Rodríguez & Sons, Inc., as well as those concerning the absence of assignment of rights, were abundantly supported in findings of fact 1-7 and at pages 35-39 of the judgment of the enlightened court of instance, which we expressly adopt.

(Opposition, App. A, *infra*, pp. 1a-2a).

Petitioner then filed a writ of certiorari to the Puerto Rico Supreme Court (Opinions Below, *supra*, No. 5), which was summarily denied by that Court without opinion (Opinions Below, *supra*, No. 6). Not satisfied with this denial, Petitioner sought two more reconsiderations, until finally the Puerto Rico Supreme Court ordered them to abide by the result (Opinions Below, *supra*, Nos. 7-10).

Petitioner next shifted its battleground to requesting of the Puerto Rico Supreme Court that it retain the mandate. Three separate motions to that effect were filed, both before and after the Petition was filed in this court, to no avail (Opinions Below, *supra*, Nos. 11-15), and the Mandate was returned to the lower court (Opinions Below, *supra*, No. 16).

At a status conference held on November 30, 1999, the lower court reset the case for trial in April, 2000. Thus, proceedings in this case are continuing pending resolution of this Petition.

## SUMMARY OF ARGUMENT

This Honorable Court lacks jurisdiction over this cause because the lower court Judgment is interlocutory.

Even if properly before this Court, the Petition should be dismissed because Due Process of Law was given to Petitioner by the Appellate Court Judgment. Due Process does not require any particular kind or amount of process.

Even if, by its enactment, Rule 10(A) gives more rights to Petitioner, and becomes incorporated into Fourteenth Amendment Due Process, Rule 10(A) does not require that the Appellate Court write a complete opinion in each case. The requirement is that sufficient analysis be performed, and sufficient record be reviewed to enable the Puerto Rico Supreme Court, on appeal or certiorari from the findings of the Appellate Court, to carry out its appellate duties.

Puerto Rico cases cited by Petitioner are different, because in those cases, there was no opinion of any kind, there was no record obtained, and no record, therefore, from which the claimant could appeal.

Finally, in any event, because of the great administrative difficulty of what Petitioner proposes, namely that all State rules creating a procedure not otherwise required by Federal Due Process give a right to certiorari in this Court, the result would not be capable of effective administration.

## REASONS FOR DENYING THE WRIT

### A. THIS COURT LACKS JURISDICTION OVER THIS CONTROVERSY BECAUSE IT IS NOT A FINAL JUDGMENT.

The applicable jurisdiction basis is supplied by 28 U.S.C. § 1258, which, in pertinent part, reads as follows: "Final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by this Supreme Court by writ of Certiorari . . ." The operative words are "final judgments."

The rule is the same as to States. Only *final* judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed. 28 U.S.C. § 1257. *See Jefferson v. City of Tarrant*, 522 U.S. 75, 118 S. Ct. 481, 139 L. Ed. 2d 433 (1997), interpreting similar language in 28 U.S.C. § 1257. In *Jefferson v. Tarrant*, certain federal issues were certified to the Supreme Court of Alabama, which decided them adversely to plaintiff, and remanded for further proceedings. It was clear that the proceedings on remand would include a trial on the merits of the state-law claims, and when the entire case is resolved the Supreme Court could examine the merits of the federal claims, on certiorari from the final judgment. Interpreting Section 1257(a), this Court stated:

> To be reviewable by this Court, a state-court judgment must be final "in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final Court" (citations omitted).

*Jefferson v. City of Tarrant, supra*, at 118 S. Ct. 485-486.

Distinguishing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975), on the *Tarrant* facts, this Court concluded:

> This case fits within no exceptional category. It presents the typical situation in which the state courts have resolved some but not all of the petitioners' claims. Our jurisdiction therefore founders on the rule that a state-court decision is not final unless and until it has effectively determined the entire litigation.

*Id.* at 118 S. Ct. 487.

The fact that review of an interlocutory decision of the lower court is denied does not convert it into a final judgment or decree. *Camaleglo v. Dorado Wings*, 118 D.P.R. 20, 27 (1986). In other words, the Court of Appeals and the Supreme Court of Puerto Rico, having denied further review does not convert the case into a final one. The decision is interlocutory because it does not dispose of any complete claim between the parties, nor does it resolve the entire controversy in favor or against any party. It is partial and interlocutory when it

decides responsibility. *First Federal Savings Bank v. Carlos Nazario González*, 95 CDT 102 (1995).

In *First Federal v. Nazario*, the plaintiff sought to foreclose on a mortgage credit. Under Puerto Rico law, this is a personal obligation and a lien on the real estate. The lower court concluded the mortgage was defectively created, and issued a final partial judgment to that effect. After a trial on the merits, the judge concluded that it could not reverse its conclusion that the mortgage had been defectively created, even though he had concluded that he was mistaken on that point, and granted judgment for plaintiff on the personal obligation. Plaintiff appealed this decision to the Puerto Rico Supreme Court, which held that since the first partial judgment did not dispose of the "claim," it was not a final adjudication on any issue. The Court stated:

> The respondent spouses are owners of the mortgaged property and personal debtors at the same time. Consequently, both actions, that is to say the real [estate] and the personal ones, are commingled in the ordinary mortgage suit.
>
> It results from our discussion that the partial judgment issued by the court the 27th of August of 1990 did not constitute a final adjudication for purposes of Rule 43.5 of the Rules of Civil Procedure, [the Puerto Rico equivalent of Federal Rule 54(b)- ed] since the same did not dispose in a complete manner of the only claim made in the complaint filed in this case. (Footnote omitted). In reality, we find ourselves confronting an interlocutory resolution of the court to which the term provided by Rule 53.1(b) for the review of judgments is not applicable.

> Consequently, First Federal did not have any obligation to recur to us by the corresponding request for review until the totality of the case was concluded. (Citations omitted). Having recurred on time from the final judgment which totally adjudged the claim filed in the complaint, we have jurisdiction to review that resolved by the lower court in its mis-denominated partial judgment of August 27, 1990.

*First Federal Savings Bank v. Carlos Nazario González*, 95 CDT 102 (1995), at pp. 4-5 (translation ours).

The courts of Puerto Rico have determined that in a bifurcated case, where liability is first tried, and then there is to be a separate trial on damages, judgment in that case is not final until the trial on damages is concluded. *Dolphin v. Ryder*, 127 D.P.R. 869, 875, n.2. *Camaleglo v. Dorado Wings, Inc., supra,* at 118 D.P.R. 26. Thus, in our case, the determination of liability is not a final resolution of any claim that Respondents have against Petitioner. What will finally resolve this controversy is a money judgment issued by the lower court after a trial on damages.

Although Respondents believe the above argument is conclusive, we will now pass to discuss the merits of the Petition. In the rest of Respondents' Opposition to the issuance of the Writ in this case, it will be assumed that this Court has leaped the hurdle of lack of jurisdiction and will deal with the merits of Petitioner's Petition.

## B. RESPONDENTS RECOGNIZE THAT THIS COURT HAS CONSISTENTLY HELD SOME FORM OF A HEARING IS REQUIRED BEFORE AN INDIVIDUAL CAN BE DEPRIVED OF A PROPERTY INTEREST, BUT THE FORM OF THE HEARING IS VARIABLE.

This Honorable Supreme Court "consistently has held that some form of hearing is required before an individual is finally deprived of a property interest." *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18 (1976); accord *Wolff v. McDonnell*, 418 U.S. 539, 557-58, 94 S. Ct. 2963, 2975, 41 L. Ed. 2d 935 (1974). Perfunctory gestures will not suffice. At bedrock, "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews*, 424 U.S. at 333, 96 S. Ct. at 902 (citation and internal quotation marks omitted).

The Court has not forged a boilerplate standard for determining what process is due in all circumstances, but, instead, has articulated three areas of particular importance. First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.* at 335, 96 S. Ct. at 903; *see also Connecticut v. Doehr*, 501 U.S. 1, 111 S. Ct. 2105, 2112, 115 L. Ed. 2d 1 (1991); *Reardon v. United States*, 947 F.2d 1509, 1518 (1st Cir. 1991) (en banc). This Court's language in *Mathews* explicates what is essentially a constitutional balancing test.

In many, if not most, instances, due process does not require a full-scale trial, or even a hearing strictly conforming to the rules of evidence. *See Mathews*, 424 U.S. at 348, 96 S. Ct. at 909; *Doyle v. Secretary of HHS*, 848 F.2d 296, 301 (1st Cir. 1988). Due process is malleable, calling "for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484 (1972). A court may hand-tailor procedures to account for the nature of the affected interests and the circumstances of the threatened deprivation. *See Neron v. Tierney*, 841 F.2d 1197, 1201 (1st Cir. 1988), *cert. denied*, 488 U.S. 832, 109 S. Ct. 90, 102 L. Ed. 2d 66 (1988). "As the rubric itself implies, 'procedural due process' is simply 'a guarantee of fair procedure.' " *Amsden v. Moran*, 904 F.2d 748, 753 (1st Cir. 1990) (*quoting Zinermon v. Burch*, 494 U.S. 113, 125, 110 S. Ct. 975, 983, 108 L. Ed. 2d 100 (1990)); *see also Newman v. Burgin*, 930 F.2d 955, 961 (1st Cir. 1991). Hence, courts will review cases involving adversarial hearings to determine whether, under the specific facts and circumstances of a given situation, the affected individual has had a fundamentally fair chance to present his or her side of the story. *Gorman v. University of R.I.*, 837 F.2d 7, 14 (1st Cir. 1988).

## C. THE PROCESS HERE AFFORDED WAS FAIR.

The question thus becomes, did the Petitioner receive a fundamentally fair chance to present its side of the story. In *Mathews, supra*, there is a weighing of three factors: (i) the private interest; (ii) the risk of error inherent in what occurred; and (iii) the public interest. The Petition in this case does not add up when analyzed using these factors.

***The private interest.*** If this Court determines that the partial final judgment entered was not interlocutory, then,

and only on that assumption, Respondents do not contest that a private property interest is involved, since the determination of liability by the lower court, affirmed by the Appellate Court and the Puerto Rico Supreme Court, if not interlocutory, will lead to a trial on the question of the amount of the damages only. If final, we agree that the issue of liability will be finally resolved in favor of Respondents if the Petition is denied, and that is a property interest protected by the Fourteenth Amendment.

***Risk of error***. This is not a case where the Appellate Court misconstrued any issue of fact or law that rises to an impairment of any Constitutional right of Petitioner . In fact, the Constitutional violation alleged is that, instead of copying *verbatim* the lower court's decision in all of its parts, the Appellate Court simply said, after reviewing the errors alleged by Petitioner in its brief, and after analyzing the legal bases which the lower court used to arrive at its conclusions, that it accepted and adopted as its own the legal analysis. Does this shorthand method mean that there is a greater risk of error when a court considers an argument so specious that it does not even discuss it? The mere fact that a court does not address all legal arguments propounded does not mean that due process is not being afforded. All courts consider themselves free to ignore, without comment, arguments raised which, in their opinion, do not merit discussion. *See Yvonne Gil de Rebollo v. Miami Heat Associations, Inc.*, 137 F.3d 56 (1st Cir. 1998): "To conclude, we find the parties' remaining arguments and claimed errors to be without merit and unworthy of extended discussion."

Rule 10(A) and Federal Due Process do not require an appellate court wishing to adopt the logic and opinion of the lower court, to rewrite the lower court opinion in order to

afford due process. It suffices to clearly establish that said decision is being adopted by reference. The Appellate Court's denial of Petitioner's appeal was on the merits, and was not a summary denial — no appellate court, satisfied with the opinion and logic of the court below can be forbidden from adopting as its own the decision of the lower court.

***The Public Interest.*** The entire appellate system in Puerto Rico, as stated by Petitioner, at p. 13 of the Petition, was designed to give a level of appeal to litigants not previously available. Petitioner was not deprived of due process — it lost on the merits of its claim, and all subsequent appellate proceedings validated the lower courts factual determination of liability.

The trier of fact is the lower court. The Appellate Court is not a court to try the case *de novo.* Any court exercising appellate review must give deference to the findings of the trier of fact. Not having trial by jury in civil cases in Puerto Rico, the lower court is both the judge and the trier of fact. Rule 10(A) is designed to allow three judges to review important decisions of the lower court to insure that the single judge below has properly received relevant evidence and has decided thereon in a proper manner. It is the process of review, not the parroting of the reasoning of the lower court, that affords due process.

The United States Supreme Court should defer to the Puerto Rico Supreme Court in its interpretation of Rule 10(A), as a matter of comity. To do otherwise is to convert the United States Supreme Court into a court of last resort on every interlocutory decision. It should be remembered, that in Puerto Rico, there is no "final judgment" rule. All orders are susceptible of review, by certiorari. *Asociación*

*de Propietarios v. Santa Barbara Co.*, 112 D.P.R. 33 (1982). To permit review of the adequacy of the Appellate Court decision in Puerto Rico will not serve the interests of Due Process, but instead, will further congest the appellate process, and promote trial by filibuster, as in this case. To rule otherwise is to make every motion denied in the lower court of Puerto Rico eventually subject to certiorari in the United States Supreme Court.

## D. HAD AN INJUSTICE OCCURRED, THIS COURT COULD HAVE REVIEWED, ON CERTIORARI, THE LOWER COURT'S DECISION, BY ANALOGY TO HOW THE STATE APPEALS ARE TAKEN.

Even assuming, which is not the case, that the Appellate Court had not reviewed the matter, but had merely denied review, and noting that the Puerto Rico Supreme Court also denied review, if this partial judgment on liability were a final partial judgment, which Respondents contest, it would appear that the same logic of 28 U.S.C. § 1257 should be applied to 28 U.S.C. § 1258, and this Court should be able to review the decision of the lower court, which is fully capable of being analyzed because it is a complete review of the facts and the law. If so construed, the fact that the Appellate Court did not render a written opinion would not imply lack of due process. *See IBEC v. Blanco Lugo*, 267 F.2d 263, 265 (1st Cir. 1959).

If § 1258 were to be interpreted, as § 1257 specifically provides, namely to permit petitions from the ". . . highest court in which a decision could be had . . . ," then Rule 10(A) would not raise any issue of denial of due process. Regardless whether Rule 10(A) existed or not, if § 1258 were interpreted

like § 1257, and the Appellate Court and the Puerto Rico Supreme Court had both succinctly issued a denial ("no ha lugar,") such action would not preclude review of the Superior Court's decision. When a state supreme court exercises its discretion (whether vested by statute or rule) to decline to review a judgment of a lower state court, the judgment of that lower state court is then reviewable by the United States Supreme Court on certiorari pursuant to 28 U.S.C. § 1257.[3] *See, e.g., Abernathy v. Alabama*, 380 U.S. 447 (1965) (certiorari to the Court of Appeals of Alabama). Moreover, in the unusual situation in which no appellate court has jurisdiction to review the trial court's judgment, the writ of certiorari of the United States Supreme Court runs to that trial court. *See, e.g., Thompson v. City of Louisville*, 362 U.S. 199, 202-03 (1960) (certiorari to the Police Court of Louisville, Kentucky).

Thus, from the point of view of having recourse, if § 1258 were interpreted like § 1257, Rule 10(A) does not

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3. Said Statute reads, in pertinent part:

> (a) Final judgments or decrees rendered by the highest court of a State *in which a decision could be had,* may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States. (Emphasis supplied.)

28 U.S.C. § 1257.

add or detract from Petitioner's right to recur on appeal to this Court. The only problem Petitioner has is that without the argument that there is a Federal Due Process violation in the manner in which the Appellate Court summarily dismissed its request for review, Petitioner has nothing that would allow it to invoke the jurisdiction of this Court. Thus, Rule 10(A) is being used by Petitioner as a bootstrap to obtain another level of review on the merits.

## E. THE LOCAL CASES INTERPRETING RULE 10(A) DO NOT APPLY BECAUSE IN THIS CASE THE APPELLATE COURT IN FACT DID RENDER A DECISION.

The case of *Maldonado Bermúdez v. Nilsa Maldonado*, 96 JTS 86 (P.R. 1996) is not similar to our facts. It appears that the Appellate Court did not review the proof, either by a transcript or a stipulated narrative exposition thereof in said case. It did not perform any evaluation of the findings of fact or of law of the lower court, nor did it adopt the reasoning of the court below, as in our case. The type of review that the Supreme Court wants, according to that decision, is sufficient review so that review of the case is possible if it comes before the Supreme Court. *Id.* at p. 1252 JTS.

The case of *Departamento de la Familia v. Shrivers Otero*, 98 JTS 46 at p. 828 (P.R. 1998), was a case where foster parents appealed to the Court of Appeals because of their dissatisfaction in having the children returned to their mother, a putative drug addict. The Appellate Court did not examine the issues on appeal. It did not ask for a stipulated or narrative summary of the testimony below. There was no transcript. Instead, it remanded the matter to Family Court

for another hearing. The Supreme Court ruled that before it did so, it had to *examine* the legal issues involved. Having failed to examine the issues, the record was bereft of matters dealing with the sufficiency of proof and there was no weighing of the evidence. Under those circumstances, it was impossible for the Supreme Court of Puerto Rico to evaluate the case on its merits, and the case was returned to the Appellate Court for decision. *Id.* at 833.

In our case, the Appellate Court had before it a stipulated narrative exposition of the proof presented to the lower court., which, contrary to *Shrivers Otero* or *Maldonado Bermudez,* placed both the Appellate Court and the Supreme Court of Puerto Rico in a position to review what had occurred below. It is for this reason that the Supreme Court did not require that the Appellate Court write a rehash of the lower court opinion, nor does it specify how many pages such an opinion should have, nor does it say that every specious argument not deserving of comment must be entertained. All the Supreme Court requires is that the Appellate Court do its job, review the evidence offered below, state the facts, *examine* the issues, and discuss and analyze the same. How incorporation by reference of a properly reasoned opinion which in the Petition took up 47 pages of the Appendix, can deny due process not only escapes reason but borders on the Charles Dickens School of Law, where generation after generation of attorneys work on the same case *ad infinitum.*

In this case, the Puerto Rico Supreme Court was able to look at the entire record. It looked at the work of the Appellate Court, and it looked at the work of the lower court, and found that it complied with its understanding of the working of the judicial process in its courts, issuing the most perfunctory of its denials: "no ha lugar." The Supreme Court

of Puerto Rico was aware of its findings in both *Shrivers Otero* and *Maldonado Bermudez*, and obviously, did not believe that the sort of errors it found in those cases were present in this one.

## F. WHAT PETITIONER SEEKS HERE IS A REVIEW DE NOVO OF THE FACTS AND THE LAW IN THIS CASE.

Petitioner, at p. 16 of its Petition says, "The Circuit Court of Appeals included no independent discussion or analysis of the legal issues involved in this case, wholly failing to address any of the many legal errors that Petitioner raised in its appeals papers." Yet, at p. 17 of the Petition, it does admit the Appellate Court did make its own statement of the facts found below (*see* Appendix B, of Petition, pp. 2a-7a, inclusive), did review the appellate brief with the errors therein alleged to have been committed, did review the lower court's decision, and, *adopted the same because it was in full agreement therewith*. It is hard to see how the Supreme Court of the United States can draw a different bright line for what Rule 10(A) requires of the Puerto Rico Appellate Court different from that of the Puerto Rico Supreme Court without risking a complete change in the nature of its daily calendar.

Petitioner also claims the following arguments were not dealt with, or were dealt with incorrectly by the Appellate Court (*See* pp. 5-6 of Petition):

1. Despite the "overwhelming" evidence to the contrary, NYDS and ARI had formed a contract. Petitioner App. at 38a, 48a.

2. NYDS was liable to ARI for breach of contract. Petitioner App. at 55a.

3. The lower court considered ERSI and ARI as one and the same for purposes of this suit, despite being separate in some respects, including being separate corporate entities. App. 50a.

It is of the nature of the judicial process that the lower court is the trier of *the facts*. The lower court weighs "overwhelming" evidence, filters it through its good sense, hears witnesses, weighs credibility, and comes to a conclusion. This is what the lower court did at the precise places cited by the Petitioner in its brief. What Petitioner wants is another trial. It is not the appellate process of Puerto Rico that is in issue. It is that Petitioner lost on questions of credibility, and just because the Appellate Court chose not to rehash all the findings of fact, but rather examined the ones it considered germane (Petitioner App. at 3a-7a), and just because the Appellate Court chose not to recapitulate the questions of Puerto Rico law, all of which were accepted and adopted as its own by the Appellate Court, Petitioner somehow feels it has been deprived of due process. The fact is that Petitioner has not been deprived of anything other than its opportunity to present the evidentiary side of the case a second time, a matter which is not the function of the Appellate Court, and which under the guise of an alleged lack of due process is a bald attempt to get a second bite at the apple before a trier of fact. Facts found below are usually upheld unless they are clearly erroneous. *Bose Corp. v. Consumers' Union of the United States*, 466 U.S. 485, 497-501, 104 S. Ct. 1949, 1957-60, 80 L. Ed. 2d 502 (1984). We are not dealing with a Petitioner deprived of due process. We are dealing with a Petitioner that cannot accept the results of the judicial process when they are not in its favor.

Had the Petitioner claimed bias, passion, partiality, or prejudice on the part of the lower court, and had these

arguments been ignored, perhaps it could have claimed a lack of due process. But, to rehash the arguments made to the lower court and to offer the same testimony (without the benefit of hearing witnesses and weighing their credibility) to an Appellate Court which rejects the same for the same reasons it was rejected below, is not a denial of due process. It is the confirmation by an appellate tribunal of the findings of fact and conclusions of law of the lower court, an event that occurs every day, and which was given the short shrift that it deserved: a summary dismissal by the Appellate Court, and a "no ha lugar" from the Puerto Rico Supreme Court, not once, but three times.[4]

## G. EVEN IF THERE WAS A FAILURE BY THE APPELLATE COURT TO GIVE NEW REASONS FOR ITS AFFIRMANCE OF THE LOWER COURT, THIS FAILURE DOES NOT RISE TO THE LEVEL OF A FEDERAL DUE PROCESS OBLIGATION, BECAUSE TO DO SO PERMITS ALL APPEALS TO BECOME ALLEGED DEPRIVATIONS OF FEDERAL DUE PROCESS.

Petitioner, at pp. 20-27 of the Petition claims there is a conflict between the Ninth and Tenth Circuits and the Fifth and Sixth Circuits whether there is a Federal Due Process

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4. It is germane to point out that on October 29, 1999, the Puerto Rico Supreme Court refused to hold the mandate pending the appeal in this case, and proceedings on the damages portion of this case are continuing in the Superior Court of Puerto Rico. These actions, coupled with the three denials of Petitioner's requests for review by the Puerto Rico Supreme Court (Petitioner App. at 56a, 57a). are a clear signal that the Puerto Rico Supreme Court is convinced the Appellate Court acted correctly, and is satisfied that, given the case it has, Petitioner has received the justice it deserves.

claim available to Petitioner, even on its best facts, namely that it has been deprived of a property right by the process employed by the Appellate Court, and the failure to comply fully with Rule 10(A). The cases in the Ninth and Tenth Circuits, however, both concluded that *even though petitioner had been deprived of a property right protected by due process by the failure to follow the procedures*, on the merits in both cases, the actions of the school bodies involved were found to have a rational basis, and were upheld. Similarly in this case, this court can uphold the principle that due process requires Puerto Rico appellate courts to follow Rule 10(A) to the letter and render a complete opinion in every case, but can also affirm the actions of the Supreme Court and the Appellate Court, and deny certiorari because as a matter of fact there was no due process violation, because whatever property right the Petitioner had was lost due to the lack of merit of its claim not to a denial of Due Process required by the Fourteenth Amendment.

As to the contrary position taken by the Fifth and Sixth Circuits, it has best been set out in *Levine v. Torvik*, 986 F.2d 1506, 1515 (6th Cir. 1993), *cert. denied*, 509 U.S.907 (1993):

> A state cannot be said to have a federal due process obligation to follow all of its procedures; such a system would result in the constitutionalizing of every state rule, and would not be administrable.

## H. OTHER DUE PROCESS CASES GIVE NO SUPPORT TO PETITIONER'S REQUEST.

Petitioner, at p. 20, compares its situation to that of Logan, an employee who under the Illinois Fair Employment Practices Act had a right to a hearing within 120 days of filing his complaint. Logan received no hearing at all, and this Court held that to deprive him of this right was a violation of due process. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). Here, Petitioner received a hearing. Petitioner just didn't like the result.

Prisoner liberty cases show the difficulty in administration of a rule that imports into due process a state regulation which may affect fundamental rights to life, liberty and property. In *Hewitt v. Helms*, 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983) this Court made it clear that in criminal liberty cases, where the liberty of the inmate is involved, if there is a State rule or regulation that established procedures for confining an inmate to administrative segregation, some form of due process is required. Still, even in this context, an informal, nonadversarial hearing was held sufficient.

This holding made courts interpreting *Hewitt* look to the regulation and ask whether the rule was mandatory or precatory, and the sort of "protections" afforded began to become ridiculous: "sack" versus "tray" lunches, playing the state lottery, attending an ex-stepfather's funeral, or the limits of travel when on prison furlough. *Sandin v. Conner*, 515 U.S. 472, 500, 115 S. Ct. 2293, 2308, 132 L. Ed. 2d 418 (1995).

Finally, in *Sandin v. Conner*, this Court rejected *Hewitt* insofar as its methodology was concerned. No longer would

the test be whether the State statute was mandatory or precatory, but rather that the interests protected would be ". . . generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, . . . nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Conner, supra,* at 515 U.S. 484. Why did this Honorable Court abandon the *Hewitt* approach? Basically for two reasons: First, that it creates disincentives for States to codify prison administration, and create guides for uniform treatment of prisoners, and second, because the *Hewitt* approach " . . . has led to the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone." *Conner, supra,* at 515 U.S. 482. This, we respectfully urge on this Honorable Court, is what will occur if the Pandora's box of Rule 10(A) is opened.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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# APPENDIX

**APPENDIX — DECISION OF THE CIRCUIT COURT OF APPEALS, SAN JUAN REGIONAL CIRCUIT DATED FEBRUARY 9, 1999**

COMMONWEALTH OF PUERTO RICO
IN THE CIRCUIT COURT OF APPEALS
SAN JUAN REGIONAL CIRCUIT

KLAN9700081

(Appeal from the Court of First Instance, San Juan Superior Section) Civil No. KPE 94-0345 (802)

ALMACENES RODRIGUEZ, INC. AND
E. RODRIGUEZ & SONS, INC.

Appellees

v.

NEW YORK DEPARTMENT STORES
DE PUERTO RICO, INC.

Appellant

Panel comprised of its president, Judge Fiol Matta, Judge Rodríguez de Oronoz, and Judge Gierbolini.

RESOLUTION

In San Juan, Puerto Rico, this 9th day of February, 1999.

Having examined the request for reconsideration dated October 23, 1998, the same is DENIED. The request that we

reconsider does not add any element to that already considered by this Court in its ruling. Contrary to the allegations of the petitioner, in our Judgment of September 23, 1998, we clearly stated that, having examined the alleged errors and having analyzed the bases for the decision of the Court of First Instance, "*this Court accepts and adopts as its own said conclusions of law*" (*See* Judgment of September 23, 1998, Part II, first paragraph, emphasis supplied). The findings regarding the relationship between the corporation named Almacenes Rodríguez, Inc., and E. Rodríguez & Sons, Inc., as well as those concerning the absence of assignment of rights were amply supported in findings of fact 1-7, and at pages 35-39 of the said judgment of the enlightened court of first instance, which we expressly adopt.

It is thus agreed and ordered by this Court, and certified by the Secretary-General.

s/s Aida Ileana Oquendo Graulau
Aida Ileana Oquendo Graulau
Secretary General